(2)

IN THE

Supreme Court of the United States

No. 06-1640

ERROL D. BEUMEL, JR.,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari
to the Indiana Court of Appeals

STATE OF INDIANA'S BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Are a defendant's Sixth Amendment rights under *Blakely v. Washington* violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and requiring it to make determinations that are beyond the competence of a lay jury?

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STATEMENT

Before *Blakely v. Washington*, 542 U.S. 296 (2004), Indiana had a determinate-sentencing scheme that allowed judges, rather than juries, to find the existence of aggravating facts that would increase a sentence above a presumptive level. *See* Ind. Code § 35-38-1-7.1 (2003); *see also* Ind. Code § 35-50-2-3(a) (2003). That old sentencing statute, in effect when Errol Beumel murdered his father, required sentencing courts to consider specific factors as either mitigating or aggravating, including (1) the risk that the defendant would commit another crime; (2) the nature and circumstances of the crime; and (3) the defendant's character. *See* Ind. Code § 35-38-1-7.1(a) (2003). Indiana courts could also consider other potentially aggravating facts, including whether the defendant had recently violated probation or parole and the defendant's history of criminal or delinquent activity. *See* Ind. Code § 35-38-1-7.1(b) (2003). The statute, however, did "not limit the matters that the court may consider" as aggravators. *See* Ind. Code § 35-38-1-7.1(d) (2003). Ultimately, the old scheme provided that "[a] person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-3(a) (2003).

Following both *Blakely* and *Smylie v. State*, 823 N.E.2d 679, 684-85 (Ind. 2005), which expressly invalidated the judge-as-fact-finder portion of Indiana's old determinate scheme in light of *Blakely*, the Indiana General Assembly adopted indeterminate sentencing. The new scheme permits a court to impose a sentence for a given crime within a range of years, while providing an "advisory sentence," which is a "guideline sentence" that is "nonbinding." *See* Ind. Code §§ 35-50-2-1.3(a); 35-50-2-3(a); *see also* Ind. Code § 35-35-3-1.

This case presents the story of a trial caught in time between *Blakely* and Indiana's legislative fix—and of one judge's unremarkable *ad hoc* attempt to involve a jury in determinate sentencing.

1. Petitioner Errol D. Beumel, Jr., shot and killed his father on April 25, 2003. Pet. App. 5. Beumel did not flee the scene and was apprehended when the police arrived in response to a 911 call from his mother, who witnessed the murder. Pet. App. 5-6. After Beumel was taken into custody, he confessed. Pet. App. 6. The State charged Beumel with murder and use of a firearm in commission of an offense. Pet. App. 6; *see also* Ind. Code §§ 35-42-1-1 (2003), 35-50-2-11 (2003). Beumel did not plead guilty, however, but instead invoked his right to a jury trial and filed a notice of intent to present the insanity defense. Pet. App. 6.

2. As noted above, important events in legal history intervened between Beumel's crime and his trial. On June 24, 2004, the Court issued its decision in *Blakely*, which held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis original). Thus, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis original).

Then, on March 9, 2005, the Indiana Supreme Court held that Indiana's determinate-sentencing statutes, as historically interpreted by the Indiana courts, violated the Sixth Amendment rule set forth in *Blakely*. *See Smylie*, 823 N.E.2d at 684-85. The Indiana Supreme Court stated that "[f]rom the time Indiana adopted its present sentencing arrangement in 1977, we have understood it as a regime that

requires a given presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances . . . ." *Id.* at 683. In accord with *Blakely*, the court held that the "presumptive term" was the relevant statutory maximum and, therefore, that a defendant's sentence could not exceed the presumptive term unless the facts used for enhancing the sentence were found by the jury or admitted by the defendant. *See id.* at 684-85.

The Indiana Supreme Court further observed that "the unconstitutionality of Indiana's present sentencing system hardly nullifies the entire arrangement." *Id.* at 685. The court held that the General Assembly had clearly intended to abandon indeterminate sentencing when it adopted this system, so the best interpretation of the sentencing statutes was to keep the fixed presumptive terms but require that any aggravating fact not admitted by the defendant be found by the jury. *See id.* at 685-86.

On April 25, 2005, in response to these decisions, the Indiana General Assembly amended Indiana's sentencing statutes and abandoned fixed presumptive terms entirely. For example, the law now provides that "[a] person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years." Ind. Code § 35-50-2-3(a). The "advisory sentence" is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence" and is "nonbinding." *See* Ind. Code §§ 35-35-3-1, 35-50-2-1.3(a).

3. Although the new indeterminate-sentencing scheme was in effect by the time Beumel was tried and sentenced, the trial court planned, if Beumel were convicted, to use the old determinate-sentencing scheme in effect when Beumel committed his crime. *See Patterson v. State*, 532 N.E.2d 604, 608 (Ind. 1988). Leading up to trial, therefore, the

prosecution and the court fashioned a method to make the determinate scheme consistent with the mandates of *Smylie* and *Blakely*. Consistent with *Smylie*'s suggested method of carrying out determinate sentencing in a post-*Blakely* world, *see Smylie*, 823 N.E.2d at 685-86, on October 12, 2005, prior to trial, the State submitted to the court a Notice of Aggravators, which included a list of 21 facts that the State would attempt to prove "in support of a sentence exceeding the presumptive sentence." Beumel State App. 339.

The idea behind submitting the Notice was that the State would prove the existence of these facts to the jury, and the facts found by the jury could then properly form the predicate for an ultimate legal conclusion by the court at the sentencing hearing as to the presence of aggravating circumstances. Such a conclusion would allow the sentencing judge to increase Beumel's sentence for murder by up to 10 years. *See* Ind. Code § 35-50-2-3(a) (2003).

On November 9, 2005, in the midst of the trial, Beumel filed a Motion to Dismiss the State's Notice of Aggravators. Beumel argued that (1) the 2003 sentencing statutes were vague and ambiguous because they did not specifically enumerate potential aggravating factors; (2) the court lacked power to convene a jury to determine aggravating facts because there is no Indiana statute or rule providing for this procedure; (3) the court could not consider aggravators that were not specifically enumerated by statute; and (4) the aggravators included in the Notice were cumulative and vague, depriving Beumel of an opportunity to prepare a defense. Beumel State App. 417-31; Tr. 2044.

As an alternative, Beumel urged that he was entitled to be sentenced under the amended sentencing statute, which, of course, would have eliminated the jury's role in sentencing altogether and would have left his sentence completely to the judge's discretion. Beumel State App. 424-25; Tr. 2044. On November 11, 2005, the same day the

jury convicted Beumel and the aggravators were submitted to the jury, the court denied Beumel's motion. Trial Tr. 2044-45.

4. At the end of the two-week trial, the jury rejected Beumel's insanity defense and convicted him of both murder and use of a firearm in the commission of an offense. Pet. App. 6. The jury instructions at the guilt phase did not include any consideration of the Notice of Aggravators submitted by the State because such instructions would have been prohibited by state law according to the trial court. Beumel State App. 440-86; *see also* Tr. 2049.

Following the verdict, the judge reconvened the jury for a separate phase of the trial to determine if the State had proven its aggravators beyond a reasonable doubt. Tr. 2048-49. The judge explained to the jury that "the State has filed an additional notice of aggravating circumstances, which are additional facts that must be proven to you beyond a reasonable doubt. These aggravating circumstances relate to the sentencing phase of the trial." Tr. 2048. At this phase, both parties had the opportunity to present evidence and witnesses, but Beumel did not present any evidence or witnesses and, instead, relied only on his previously denied motion to dismiss. Tr. 2052 ("Judge, based on my Motion, I will not do an opening statement."); Tr. 2062 ("[B]ased on my Motion, Judge, I'm waiving closing.").

This phase of the trial was very short. The State had only one witness—Janet Beumel, the defendant's mother. Tr. 2053-57. Otherwise, the State incorporated the rest of its guilt-phase evidence by oral motion and delivered a closing argument, asking the jury to find that the State had proven the aggravators beyond a reasonable doubt. Tr. 2058-62. At the close of the State's presentation, the judge instructed the jury as to each aggravator that "[i]f the State fails to prove this fact beyond a reasonable doubt, you must find that this aggravating circumstance does not exist." Beumel State

App. 522-33; Tr. 2062.[1] The judge also instructed the jury that its verdict must be unanimous as to the presence or absence of each factor listed in the special-verdict form. Beumel State App. 532.

After a short deliberation, the jury returned the special-verdict form, finding that the State had proven beyond a reasonable doubt the existence of all aggravators in its Notice. Pet. App. 35-37. The judge then dismissed the jury and set a separate sentencing hearing for December 9, 2005, where the court would hear any mitigating evidence, weigh that evidence against the aggravators found by the jury, and then pronounce the proper determinate sentence. Tr. 2064.

5. At the sentencing hearing, the court reviewed the presentence report with Beumel and asked if he had any corrections to make to the report. Tr. 2066-67; *see also* Ind. Code § 35-38-1-8 (requiring court to consider presentence report prepared by probation department in making sentencing determination). Beumel made several minor corrections to the report. Tr. 2067-72. Beumel also presented several mitigating witnesses to testify on his behalf, including family members and psychiatrists testifying as to his mental-health problems. Tr. 2072-2097. The State did not offer any evidence at this hearing. Tr. 2097.

In its Order of Judgment and Sentence, the court explained that "several of the aggravators [found by the jury] are related to others on the list." Pet. App. 21. The court

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[1] The Final Instructions contain only 16 aggravators while the jury's special-verdict form contains 21 aggravators. Pet. App. 35-37; Beumel State App. 522-34. The jury's special-verdict form erroneously contained five aggravators that the State had previously agreed to dismiss. Pet. App. 19; Tr. 2111. Beumel does not argue that this error has in any way prejudiced him (aside from the alleged prejudice resulting from this procedure in its entirety). Pet. 8-12.

determined their "weight by considering them with the others that are related," meaning that the court did not double count related factors. Pet. App. 21. Then, based on the aggravating facts found by the jury, the court determined three of the statutory circumstances to be aggravating, *see* Ind. Code § 35-38-1-7.1 (2003):[2] (1) the nature and circumstances of the crime, (2) Beumel's drug abuse and related conduct, and (3) Beumel's history of criminal activity. Pet. App. 21-28.

More precisely, in considering the "nature and circumstances of the crime," as required under Indiana Code § 35-38-1-7.1(a)(2) (2003), the court noted that the "circumstances of this crime were far graver than the court ordinarily encounters in the offense of Murder." Pet. App. 21. In reaching this conclusion, the court relied on three facts that the jury had specifically found in its special verdict:

> (1) The brutality of the crime; (2) Errol Beumel Sr. was defenseless during the defendant's attack upon him and attempted to flee. The defendant prevented his escape;

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[2] Indiana Code § 35-38-1-7.1 (2003) guided the sentencing proceeding of the court. The statute required the court to consider certain facts (if proven), including (1) the risk that the defendant will commit another crime, (2) the nature and circumstances of the crime, and (3) the defendant's character. *See* Ind. Code § 35-38-1-7.1(a) (2003). These facts could be either aggravating or mitigating. The statute suggested that the court may consider other potentially aggravating facts, including (1) whether the defendant had recently violated probation or parole and (2) the defendant's history of criminal or delinquent activity. *See* Ind. Code § 35-38-1-7.1(b) (2003). The statute made clear, however, that the enumerated facts did "not limit the matters that the court may consider" as aggravators. *See* Ind. Code § 35-38-1-7.1(d) (2003).

> and (3) The defendant's act in committing Murder was senseless and disturbing in that it was committed on Errol Beumel Sr., a person who, by reason of his relationship with the defendant, was especially vulnerable to the defendant. The defendant violated the trust in that relationship.

Pet. App. 22.

With respect to the drug-abuse aggravator, the court explained that Beumel "willfully and purposely abused the drug Adderall and others to the extent that he became psychotic at times." Pet. App. 23. The Court relied on seven facts specifically found by the jury in its special verdict that "deserve very heavy weight":

> (1) Defendant's drug and alcohol abuse; (2) There is a high risk that the defendant will reoffend; (3) Defendant refused to take steps to deal with his supposed problems, including therapy when recommended; (4) The defendant improperly exploited one or more physician-patient relationships; (5) Defendant's altercations with and threats and violence towards his parents; (6) Short-term incarceration did not deter the defendant from commission of further crime; and (7) Defendant's lack of remorse and his failure to accept responsibility for the Murder of his father Errol Beumel Sr.

Pet. App. 23, 26.

Finally, concerning Beumel's history of criminal activity, the court relied on five facts specifically found by the jury in its special verdict:

> (1) Defendant's history of criminal activity; (2) Defendant committed crimes while on bond; (3) Defendant's history of contacts with police for violence and unruly behavior; (4) Defendant's altercations with

> and threats and violence towards his parents; (5) Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.

Pet. App. 27. In weighing these facts, the court explained that they deserved great weight because of their seriousness and because they demonstrate that Beumel was "unlikely ever to change." Pet. App. 28.

The court also considered evidence of mitigating factors presented by Beumel, including Beumel's young age, his lack of criminal convictions, and his alleged mental illness. Pet. App. 28. However, the court determined that these factors did not deserve much, if any, weight. Pet. App. 28-29. Finally, the court concluded that the aggravators outweighed the mitigators and, pursuant to the determinate-sentencing statute, increased the presumptive sentence by 10 years and imposed the maximum sentence of 65 years for murder and five years for the use of a firearm in the commission of an offense, with sentences to run consecutively. Pet. App. 31; Tr. 2117.

REASONS FOR DENYING THE PETITION

Invoking *Miranda*, Beumel unabashedly urges the Court to adopt sweeping rules that would constitutionalize the details of instructing juries at sentencing—and in some cases, ban jury sentencing altogether. Pet. 14-16. More precisely, Beumel asks the Court to impose three rules regulating post-*Blakely* jury-sentencing schemes: (1) "that any aggravators presented to a jury must be specifically enumerated by statute;" (2) that juries "decide[e] mitigators as well as aggravators;" and (3) that "juries may not . . . render opinions on a particular defendant's culpability in relation to . . . cases as a category" because they are "beyond a lay jury's expertise." Pet. 15-16. Beumel thus essentially argues that the Sixth Amendment right to jury trial somehow

requires juries to consider and balance relevant facts in a particular way and yet *precludes* them from deciding too much. Pet. 14-16.

The counterintuitive, counter-textual nature of this argument aside, history and practice do not support Beumel. Several states have long histories of employing juries not only to decide predicate facts related to sentencing, but also to determine the ultimate sentence. *See, e.g.*, Ark. Code § 5-4-103(a) ("If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding . . . ."); Ky. Rev. Stat. § 532.055 ("Upon return of a verdict of guilty . . . against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided . . . by law."); Va. Code § 19.2-295.1 ("In cases of trial by jury, upon a finding that the defendant is guilty of a felony or a Class 1 misdemeanor, . . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury."). And the Court itself has explained that "States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide judgment." *Tuilaepa v. California*, 512 U.S. 967, 974 (1994). Surely, such wide latitude is also permissible for non-capital sentencing juries.

These merits concerns are largely beside the point, however, because Beumel's Petition has significant threshold problems. First, he fails to establish any connection between the Sixth Amendment question he presents and any supposed limits on the role of sentencing-phase juries. Next, Beumel waived his sentencing-phase jury-trial rights below when he urged the trial court to remove the jury from his sentencing completely. Third, Beumel proposes his sweeping Sixth Amendment jury-instruction rules as a means to attack a single judge's *ad hoc* attempt to harmonize Indiana's now-

defunct determinate-sentencing scheme with the Court's decision in *Blakely*. Under these circumstances, where there is not even a split of authority begging for resolution, there is no need to review one trial court's attempt to cope with *Blakely* on-the-fly.

I. The Limits of the Question Presented and Beumel's Failure to Present Intelligible Constitutional Arguments Below Make this Case an Unsound Vehicle for Supreme Court Review

A. The question presented is limited to Sixth Amendment rights, but Beumel, if anything, asserts a violation of due-process rights

The question that Beumel presents in his Petition asks only whether submitting aggravators to a jury violates the Sixth Amendment right to a jury trial as announced in *Blakely v. Washington*, 542 U.S. 296 (2004). Pet. i. On its face, the question is bewildering. It is hard to conceive how a defendant's right to a jury trial could *ever* be violated by a practice that allowed the jury to find all facts that increased the defendant's sentence.

Even more significant for this stage of the case, however, the question presented does not coincide with the arguments Beumel makes in his Petition. If anything, Beumel makes arguments that sound in due process. In fact, at trial, Beumel explicitly relied on *due process* when objecting to the trial court's sentencing procedure. *See* Pet. App. 47 (Beumel's Motion to Dismiss State's Notice of Aggravators, arguing that the Notice did not "satisfy the due process clause" because it was "cumulative and fail[ed] to provide sufficient specificity to prepare a defense"); Tr. 2044 (arguing that the defendant's "right under due processes [sic] entitles him to have the jury decide aggravators"); *see also* Beumel Ind. Ct. App. Br. 24 (arguing that Beumel's sentence should be

overturned because certain aggravators were "issues that were reserved for the sentencing judge, not the jury").

Even now, Beumel only cites a handful of Sixth Amendment cases, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the cases decided in its wake. Pet. 7, 14. None of these cases, however, has anything to do with how courts are to instruct or otherwise manage juries in the course of implementing determinate-sentencing schemes. Instead, these cases simply enforce the Sixth Amendment command that all facts which increase a defendant's sentence above the statutory maximum must be proven beyond a reasonable doubt to the jury. *See Apprendi*, 530 U.S. at 490; *see also United States v. Booker*, 543 U.S. 220, 232 (2005); *Blakely*, 542 U.S. at 303-04; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

The rest of Beumel's argument to the Court relies on notions of fairness and equity—concepts traditionally associated with due process. Pet. 9 (speaking of the "poisonous effect of such undue repetition"); Pet. 10 (arguing that "undue repetition of aggravators likely egged the jury on to find *more* aggravators than they otherwise would have"); Pet. 11 (arguing that the Notice of Aggravators "taints the jury's ability to fairly and neutrally assess the culpability of an act"). Beumel incants words from *Blakely*, but then argues that the Notice of Aggravators "was cumulative, derivative, and too vague to put him on notice of the State's sentence-enhancing allegations [to] let him prepare a meaningful defense." Pet. 6. Ultimately, the thrust of his argument seems to be that the sentencing-phase jury instructions were fatally insufficient. The constitutional sufficiency of jury instructions, however, is a matter of due process, not a matter of the right to jury trial. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Thus, there is no connection between Beumel's substantive arguments and *Blakely* or the Sixth Amendment.

As for the possibility that Beumel might be asserting legitimate due-process arguments, Beumel has pleaded himself out of this Court. The Court's rules expressly limit its consideration to the question presented in the Petition. *See* S. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Rule 14.1(a) serves the important function of "reliev[ing] the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992); *id.* at 535 ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) ("Our faithful application of Rule 14.1(a) thus helps us ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition."). Thus, the Court should not grant certiorari to resolve the unpresented question of whether the sentencing procedure used in this case violated Beumel's due-process rights.

B. Beumel has waived his Sixth Amendment rights and any due-process arguments related to sentencing

Even if the Sixth Amendment does have something to do with how a court instructs a sentencing-phase jury—or even if due-process arguments are somehow within the scope of the question presented—Beumel has already waived the rights he now attempts to assert.

1. In the trial court, Beumel expressly relied *only* on the Due Process Clause and state law when objecting to the sentencing procedure. Pet. App. 52, 54 (objecting to sentencing based on due process). He in no way invoked his Sixth Amendment right to have a jury decide facts related to sentencing.

Even more revealing is *why* Beumel did not invoke the Sixth Amendment at trial. In his Motion to Dismiss the State's Notice of Aggravators, Beumel made five arguments, which are divisible into two groups: (a) two that betray Beumel's preference not to involve the jury in sentencing at all; and (b) three that attack on other statutory and due-process grounds the method of instructing the jury.

a. **Beumel's demands not to involve the jury**: In the first category, Beumel objected to the Notice of Aggravators on the grounds that he was entitled under the doctrine of amelioration to be sentenced under Indiana's new murder-sentencing statute. Beumel State App. 424-25. That new statute, again, eliminated determinate sentencing and with it *any* role for the jury in sentencing. *See* Ind. Code § 35-50-2-3(a); *see also* Ind. Code §§ 35-35-3-1; 35-50-2-1.3(a). The trial court, however, held that Beumel had to be sentenced under the old statute (with *Blakely/Smylie* modifications). Tr. 2049; *cf. Patterson v. State*, 532 N.E.2d 604, 608 (Ind. 1988). In a related but separate objection, Beumel also argued that state law (meaning the old sentencing statute) did not procedurally allow the jury to consider aggravators. Beumel State App. 426-27. This assertion was, of course, accurate, but the trial court, backed by the *Smylie* decision, ruled that engrafting the old determinate-sentencing statute with a jury fact-finding role was an acceptable solution. *See Smylie v. State*, 823 N.E.2d 679, 684-85 (Ind. 2005).

Taken together, these objections amount to a waiver of any Sixth Amendment right to have a jury consider the statutory aggravators *at all*, much less to have a jury be instructed in any particular way.

b. **Other statutory and due-process objections**: In the second category, Beumel argued that state law limited the consideration of aggravators to those specifically enumerated by statute. Pet. App. 47 (arguing that the "legislature has evidenced its intent that certain specific aggravators . . . are

no longer proper aggravators to be considered in sentencing"). In a similar vein, Beumel argued that, to the extent it permitted consideration of factors *other* than those specifically enumerated by statute, Indiana's determinate-sentencing scheme was unconstitutionally vague and ambiguous. Beumel State App. 425-26. Finally, Beumel argued that the Notice of Aggravators did not satisfy "due process" because it was "cumulative and fail[ed] to provide sufficient specificity to prepare a defense." Pet. App. 47.

Only two of these have anything to do with constitutional rights, and both of those plainly invoke due-process principles, not Sixth Amendment principles (which is consistent with Beumel's stated preference not to be sentenced by a jury). Beumel thus did not preserve for review any Sixth Amendment arguments.[3]

2. On appeal, Beumel complained about the way the trial court instructed the jury as to sentencing, calling the instructions "repetitive" and otherwise improper. Beumel Ind. Ct. App. Br. 24-28. But there, he based his arguments entirely on *state* law, not the Sixth Amendment or even the Due Process Clause of the Fourteenth Amendment. Beumel cryptically argued that, under state law, "derivative" aggravators could not be considered as "separate" aggravators, but instead "may only be considered in regard to the weight to be assigned to the other aggravator[s]." Beumel Ind. Ct. App. Br. 25. He also argued that weighing

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[3] To be sure, Beumel cited *Blakely* to the trial court, but only nominally and not for any intelligible Sixth Amendment claim. Beumel State App. 424-29; Pet. App. 43-49. Beumel invoked *Blakely* only to explain that its "impact on . . . Indiana sentencing has been significant and unexpected" and that *Blakely* "and its aftermath have significantly increased the procedural protections provided to defendants relevant to sentencing and have clearly emphasized the importance of a defendant's constitutional rights." Beumel State App. 426.

aggravators was not a jury function at all, but the function of the sentencing judge under state law. Beumel Ind. Ct. App. Br. 25. Beumel cited *Blakely* for the proposition that weighing aggravators constitutes a legal judgment and thus was untouched by *Apprendi* and its progeny, but did not invoke *Blakely* (or *Apprendi*) for the notion that a court must instruct a sentencing jury in any particular way. Beumel Ind. Ct. App. Br. 27.

Thus, Beumel's opening brief in the Indiana Court of Appeals did not include an argument based on *Blakely* or the Due Process Clause. *See* Appellant's Br. 24-28. And his reply brief in that court did not cite *any* federal cases. *See* Beumel Ind. Ct. App. Reply Br. 6-8. Not surprisingly, the Indiana Court of Appeals did not address whether the trial court's *ad hoc* attempt to deal with *Blakely* was constitutionally permissible. Pet. App. 14-18; *see also* Pet. App. 16 n.1 ("Defendant does not challenge the three aggravating factors found by the trial court or the trial court's balancing of aggravating or mitigating factors.").

3. When seeking discretionary review by the Indiana Supreme Court, Beumel for the first time began to formulate and assert the Sixth Amendment right that he presents in his Petition to this Court. Beumel Pet. to Transfer i. Beumel's questions presented included the following: "Are a defendant's *Blakely* and *Smylie* rights violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and expressly inviting the jury to perform the sentencing judge's balancing of those aggravators?" Beumel Pet. to Transfer i.

Beumel argued to the Indiana Supreme Court that his case would help it fashion rules for jury instructions at the sentencing phase. Beumel Pet. to Transfer 8-10. However, he based the need for such rules on the notion that instructions "must not bias the jury by unduly emphasizing particular facts." Beumel Pet. to Transfer 8. This focus on

the notion of *bias* is yet another invocation of *due-process* principles, not Sixth Amendment rights. Beumel also reiterated his argument that consideration of "derivative" aggravators was, under state law, part of "weighing," and that other aggravators required legal conclusions that state law similarly reserved for the sentencing judge. Beumel Pet. to Transfer 8-9. Ultimately, despite how he initially phrased the issues, Beumel did not explicitly rely on *Blakely* or the Sixth Amendment in his arguments to the Indiana Supreme Court. And, again, the Indiana Supreme Court ultimately denied review. Pet. App. 33-34.

* * *

Supreme Court Rule 14.1(g)(i) requires that a petitioner explain in detail where the "federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by [the state] courts." Beumel has not complied with that Rule and, in fact, would have this Court be the first to address the application of the Sixth Amendment and *Blakely* to this case. As the Court has repeatedly explained, it "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

II. There is No Call to Review a Single Judge's *Ad Hoc* Post-*Blakely* Jury-Sentencing Procedure, Especially in a Case from a State that has Abandoned Determinate Sentencing

Beumel identifies no reasons why consideration of this case is in any way a matter of pressing national concern. He does not, and cannot, assert a lower-court conflict as the basis for granting review, and he makes no attempt to show that the flaws he claims plagued the *ad hoc* process used below arise anywhere else with any frequency.

Beumel himself admits that his case is "unusual"—though he argues, without a shred of proof, that this case somehow "typifies State trial courts' difficulties in implementing *Blakely*." Pet. 5, 7. And he essentially concedes that this case does not provide a useful vehicle for building on *Blakely* when he acknowledges that important *Blakely* implementation issues can be resolved only if the case were "consolidated with other cases raising similar issues." Pet. 7. Yet Beumel makes no attempt to identify any such cases that might be in the pipeline on their way to the Court. He does not even describe in general terms the types of cases and issues the Court might look for to complement review of this case. Beumel evidently expects the Court to take the case on blind faith that, in doing so, it can resolve some ill-defined national problem that has yet to emerge.

Even if there truly is some nationally important, post-*Blakely* jury-sentencing issue lurking in the shadows, a case from Indiana is not the place to resolve it. Again, Indiana has now scrapped determinate sentencing altogether. *See, e.g.*, Ind. Code §§ 35-50-2-1.3(a), 35-50-2-3(a). So even if there were some constitutional defect in the sentencing process used by the trial court in this case, no future Indiana cases or defendants would benefit from a Supreme Court ruling here. And, to be candid, with no determinate-sentencing system at stake, Indiana lacks the proper incentives to mount a thoroughgoing defense of *any* particular mode of involving juries in the sentencing process. If the Court is looking for a post-*Blakely* jury-sentencing scheme to review, it should wait for a case from a State that actually has one.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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